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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1542

UNION ELECTRIC COMPANY,

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Amicus Curiae Brief of the State of California in Support of Respondent.

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IN THE

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Amicus Curiae Brief of the State of California in Support of Respondent.

Question Presented.

There are two components to the question presented by Petitioner for which this Court granted certiorari:

1. Whether the EPA Administrator is required, prior to approving a state implementation plan under Section 110(a)(2) of the Clean Air Act, to determine if any emission source will be unable to comply with the implementation plan's requirements due to technological or economic infeasibility;

2. Whether alleged grounds of technological and economic infeasibility may serve as a basis for judicial review, pursuant to Section 307(b)(1) of the Clean Air Act, of a state implementation plan approved by EPA under Section 110(a)(2).

Introduction.

A principal objective of the Clean Air Act Amendments of 1970 was to make it clear that industry must bear the responsibility for developing the technology necessary to achieve and maintain the national primary ambient air quality standards. As Senator Muskie, one of the sponsors, stated:

> "The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. . . . This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met."[1]

Widespread attention has already been drawn to the technology-forcing demands which Congress imposed on the automotive industry[2] to produce new cars which could meet tough emission standards by 1975 and which, at the time of their enactment in 1971, were beyond the range of apparent technological capability. Less attention, however, has been given to technology-forcing provisions of the Clean Air Act dealing with stationary industrial pollution sources.[3]

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[1]116 Cong. Rec. 32901-02 (1970).

[2]Title II, Clean Air Amendments of 1970, Sections 201 *et seq.;* 42 USC section 1857f-1 *et seq.*

[3]Title I, Clean Air Act Amendments of 1970, section 110, 42 USC sections 1857c-5 *et seq.;* John Bonine, "*The Evolution of 'Technology-Forcing' in the Clean Air Act,*" Bureau of National Affairs, Environment Reporter Monograph No. 21, page 1 (July 25, 1975) (hereafter cited as *The Evolution of Technology-Forcing*). *The Evolution of Technology-Forcing* article contains a thorough analysis of the shift in public policy during the 1950s and 1960s, which culminated with Congress imposing, in the 1970 Clean Air Act Amendments, the responsibility on industry to develop and perfect technology that would achieve and maintain clean air standards. The focus of the article is on the legislative history of the Air Pollution Control Act of 1955, the Clean Air Act of 1963, the Air Quality Act of 1967 and the 1970 Clean Air Act Amendments. Particular attention is given to an analysis of the committee hearings, committee reports and floor debates during enactment of the 1970 amendments, on the question of whether economic and technological feasibility must be considered in implementing the Clean Air Act.

This case raises for the first time to this Court the question of whether stationary sources of air pollution, such as fossil-fuel power plants, may attack the validity of technology-forcing air pollution standards, regulations or emission limitations, contained in state implementation plans, through the judicial review provisions of the Clean Air Act[4] on the grounds that, in approving plans containing such technology-forcing standards, the Environmental Protection Agency (EPA) failed to consider technological or economic feasibility of compliance. Technically speaking, the issue raised in this case is whether alleged grounds of technological and economic infeasibility, arising more than 30 days after EPA's approval of a state implementation plan, may serve as a basis for judicial review of the validity of such plan or requirement. Amicus curiae believes that the scope of judicial review under Section 307(b)(1) is the same whether alleged grounds of infeasibility existed prior to EPA's approval of the plan or arose more than 30 days later. The Court of Appeal can only review whether EPA considered the "relevant factors" set forth in Section 110 (a)(2). If new grounds arise more than 30 days after EPA's approval action, the Court of Appeal may

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[4]Clean Air Act Section 307(b)(1); 42 USC section 1857h-5(b)(1).

only consider those new grounds if they could have been considered by EPA, pursuant to Section 110(a)(2) (had such new grounds existed at the time the implementation plan was being reviewed for EPA approval). Therefore, amicus curiae's arguments will address the issue in this case from the broader standpoint of whether the EPA Administrator may disapprove state implementation plans based on grounds of technological or economic infeasibility (or whether a Court of Appeal may consider such infeasibility during judicial review of the Administrator's approval of a plan). Amicus curiae will also address the related questions of when and to what extent technological and economic infeasibility grounds may be raised during the implementation of the Clean Air Act.

What is really at stake in this case is the integrity of Congress' technology-forcing objective. If, as petitioners argue, the EPA Administrator must consider technological and economic feasibility of compliance in approving or disapproving state implementation plans (SIPs) (or if the Court of Appeal during judicial review of the Administrator's decision must consider such factors), then the Clean Air Act's technology-forcing objective will be effectively sterilized. This emasculation would result because technology-forcing standards or emission limitations typically envision a prescribed period of time in which a given pollution source or class of sources must use good faith efforts to develop and perfect technology which will enable timely compliance with the standard or emission limitation. Since the technology-forcing standards or emission limitations are, by definition, unachievable with control technology available at the time of their adoption,

it necessarily follows that if EPA (or the Courts of Appeal during judicial review of EPA approvals) must consider economic and technological feasibility of proposed technology-forcing standards or limitations at the plan approval stage, only those standards or emission limitations for which control technology is available (or virtually available) are likely to be approved and sustained during judicial review. Petitioner's arguments —that economic and technological feasibility of complying with standards and limitations must be considered at the plan approval stage (or at a later time, as grounds for invalidating a plan)—are really arguments that the development of new technology for controlling air pollution must proceed at a pace dictated by the pollution source, consistent with what that source perceives is economically and technologically feasible.[5] These arguments are contrary to the objectives of the Clean Air Act Amendments of 1970. The 1970 Amendments make it clear that public health considerations are paramount, and that the pace of technological development for controlling air pollution is to be dictated, not by the pollution sources, but by implementation plans which specify the degree of emission reductions necessary to achieve and maintain healthful air by the statutory deadline.

Considerations of economic and technological feasibility of compliance may, of course, be relevant at some point; they may become relevant at the point in time nearing the deadline for compliance when, despite demonstrable good faith efforts to develop effective control technology, such technology is still unavailable or is economically infeasible and the emission

[5]*The Evolution of Technology-Forcing*, 2, *supra*, note 3.

source is compelled to seek a variance to allow compliance later than the deadline. Such considerations may also become relevant during enforcement proceedings to structure compliance orders. Good faith effort by the emission source to develop effective control technology is the critical element in technology-forcing.[6] Good faith efforts to work in the future cannot be judged at the time the standard is adopted but only retrospectively, when the deadline for compliance nears or has passed.[7]

The Eighth Circuit's opinion below (*Union Electric Co. v. EPA*) correctly gauged this point and should be affirmed.

Interest of Amicus Curiae, State of California.

California's air pollution control law, recently recodified[8] provides local and regional air pollution control districts with authority to adopt and enforce, with respect to nonvehicular air pollution sources, rules and regulations necessary or proper to achieve and maintain state and federal ambient air quality standards.[9] The adoption of technology-forcing standards

[6]"[T]he absence of demonstrable good faith efforts toward compliance should serve to dampen any enthusiasm for technological and economic [feasibility] arguments." *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975).

[7]In this regard, the economic and technological feasibility of an emission standard cannot be predicted or determined until after an affected industry has made concerted good faith efforts to develop the necessary technology. *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301, 1309 (2nd Cir. 1975), *cert. denied sub nom. Firestone Plastics Co. v. U.S. Dept. of Labor*, 43 LW 3625 (May 27, 1975).

[8]California Assembly Bill 1758, Chapter 957, Statutes of 1975, 1975-76 Regular Legislative Session (effective January 1, 1976).

[9]California Health and Safety Code sections 39606, 40702, 41507, 41601, 41602.

and limitations is authorized by state enabling legislation.[10] Provisions governing the issuance of variances from compliance contemplate that the affected pollution sources demonstrate good faith efforts to comply.[11]

California's interest in this case is to seek legal clarification and assurance that any of its technology-forcing air pollution control standards or emission limitations, contained in its State Implementation Plan, are not compromised by a decision that would mandate EPA to consider economic and technological feasibility in its approval of state implementation plans. Similarly, California is concerned that any

[10]California Health and Safety Code section 41703. Examples of technology-forcing air pollution control standards and limitations are Rules 61 and 63 of the San Diego Air Pollution Control District. Rules 61 and 63, adopted in 1972, established a requirement that sources of hydrocarbons (which contribute to photochemical smog), mainly gasoline service stations and bulk storage tanks, have to install vapor recovery equipment which will capture virtually all escaping vapors and recover at least 90% of these vapors on a continuing basis. Recognizing that technology capable of meeting these standards was not available in 1972, the Directors of the Air Pollution Control District prescribed a future deadline for compliance, later extended to December 1974. The local legislative body determined that if the affected sources (mainly major oil companies) used good faith efforts to develop and perfect vapor control technology, such sources could be in compliance by the prescribed deadline. The effect of Rules 61 and 63 has been to force the development and perfection of "vacuum-assist" vapor control technology, which has recently demonstrated the capability of complying with these Rules. Arguments by affected sources, that compliance with Rules 61 and 63 is economically and technologically infeasible, have been raised before the legislative body (in an attempt to lower the standards), before the air pollution control hearing board (to obtain variance relief) and in state court (contesting the validity of the Rules). Although variances have been granted, arguments of economic and technological infeasibility have thus far not prevailed in weakening or invalidating Rules 61 and 63.

[11]California Health and Safety Code sections 42352(b), 42354, 42355, 42362, 42402, 42403.

of its technology-forcing standards or emission limitations not be compromised by a decision that Courts of Appeal (during judicial review of EPA plan approvals under section 307(b) of the Clean Air Act) must consider economic and technological feasibility, or must independently develop an evidentiary record of such feasibility through an appointed Master and review a state implementation plan based on such new record.

From the standpoint of law enforcement responsibilities[12] and from the standpoint of insuring that the integrity of the Clean Air Act's technology-forcing objectives are not weakened, the California Attorney General is vitally concerned with the outcome of this case.

Summary of Argument.

Section 110(a)(2) of the Clean Air Act sets forth the minimum requirements that must be contained in state implementation plans. In reviewing a proposed implementation plan for approval, the EPA Administrator's discretion is confined to determining if the minimum requirements are present. If the minimum requirements are met, the Administrator is obligated to approve the plan. There is nothing in Section 110(a)(2) that expressly or impliedly requires emission standards in state plans to be economically or technologically feasible and the Administrator may not by regulation or otherwise add a feasibility requirement to the approval process.

Similarly, a court reviewing the Administrator's action in approving an implementation plan may not

[12]The California Attorney General is authorized to enforce local air pollution control district rules and regulations. California Health and Safety Code Sections 41509, 42403.

consider economic and technological feasibility, since the court can only review whether the Administrator considered the statutory "relevant factors" set forth in Section 110(a)(2). It makes no difference that the grounds of alleged infeasibility arose after the 30-day review period in Section 307(b)(1). Even post 30-day review grounds of alleged infeasibility must be rejected because the reviewing court can only consider new grounds which would have been relevant had such grounds existed at the time of EPA's approval action under Section 110(a)(2).

The legislative history of the 1970 Clean Air Act Amendments makes it clear that Congress intended to preclude economic and technological feasibility from being a limiting factor in the approval or judicial review of implementation plans. In the Conference Committee version of the bill, all references to economic and technological feasibility of compliance were deliberately removed, except with respect to new source performance standards. Rather than limiting compliance to what was feasible, Congress intended that stationary emission sources go beyond what was immediately feasible or available and bear the burden of researching and developing new control technology, if necessary, to permit states to attain national ambient air quality standards by the statutorily prescribed deadlines.

With regard to Petitioner's due process concern that the Eighth Circuit's judgment below precludes infeasibility or impossibility of compliance from *ever* being considered, amicus curiae takes the position that the states may consider technological and economic feasibility during the preparation of State implementation plans, in allocating clean-up burdens among individual

emission sources or classes of sources—so long as such considerations do not prevent timely attainment and maintenance of the national ambient air standards. The Clean Air Act, however, does not compel the states to consider technological and economic feasibility during the preparation of implementation plans. The states are free to adopt technology-forcing emission standards in their implementation plans which otherwise might be precluded on grounds of technological or economic infeasibility. In the event new grounds arise which allegedly justify a relaxation of technology-forcing emission standards, affected emission sources must initially seek relief at the state level by petitioning the appropriate agency to revise the standard. A state may then consider technological and economic factors in reallocating clean-up burdens based on such new grounds, so long as timely attainment of the national standards is not thereby impaired. New grounds arising after EPA approval of a state implementation plan may also serve as a basis for granting affected emission sources variance relief in the form of extensions to compliance deadlines—subject, again, to the requirement that timely attainment of the national ambient standards is not impaired.

In addition, "safety valves", expressly provided by the Clean Air Act, permit consideration of economic and technological feasibility if, despite an emission source's good faith efforts to comply, technology is unavailable at the compliance deadline. Sections 110 (e), 110(f) and 113 contain the "safety valves"; these provisions belie petitioner's claim that the Eighth Circuit's holding would violate due process.

The Eighth Circuit's decision below should be affirmed.

ARGUMENT.

I

In Reviewing the Validity of an EPA-Approved State Implementation Plan, the Court of Appeal May Not Consider Alleged Grounds of Economic and Technological Infeasibility. Infeasibility May, However, Be Considered at Other Stages During the Implementation of the Clean Air Act.

The Court of Appeal's jurisdiction, under Section 307(b)(1) of the Clean Air Act, to review the validity of an EPA-approved state implementation plan, is confined by the very terms of that Section to reviewing the EPA Administrator's approval action. It is necessary, therefore, to look first at the statutory provisions governing the Administrator's approval action.

A. Section 110(a)(2) Contains the "Relevant Factors" Defining and Limiting the EPA Administrator's Action in Approving State Implementation Plans.

The Eighth Circuit's Opinion below correctly construes Section 110(a)(2) of the Clean Air Act[13] to preclude the EPA Administrator from considering economic and technological feasibility of compliance in its review of proposed state implementation plans (SIPs). Section 110(a)(2)(A)-(H) limits the Administrator's discretion in approving or disapproving SIPs to a consideration of the following "relevant factors":

> 1. Whether the SIP or portions thereof were adopted after reasonable notice and hearing [Section 110(a)(2)];
>
> 2. Whether the SIP provides for attainment of the national primary ambient air quality stand-

[13] 42 USC section 1857c-5(a)(2).

ards *as expeditiously as practicable, but in no case later than three years from the date of approval,* or whether the SIP specifies a reasonable time for attaining the national secondary standards [Section 110(a)(2)(A)] (emphasis added);

3. Whether the SIP contains the requisite emission limitations, schedules, and timetables for compliance with such limitations and any other necessary measures for insuring attainment and maintenance of the primary and secondary standards [Section 110(a)(2)(B)];

4. Whether the SIP contains provisions for establishing and operating devices, systems and procedures for monitoring data on ambient air quality and making such data available to EPA [Section 110(a)(2)(C)];

5. Whether the SIP contains procedures for pre-construction review of the location of new stationary sources subject to Section 111 new source performance standards [Section 110(a)(2)(D)];

6. Whether the SIP contains adequate provisions for intergovernmental cooperation in controlling interstate or inter-regional pollution [Section 110(a)(2)(E)];

7. Whether the SIP contains necessary assurances that the state can carry out the SIP, whether the SIP requires source monitoring of emissions and periodic reports on the nature and amount of emissions, whether the SIP provides that emissions data is correlated with emission limitations and standards and is made available to the public, and whether the SIP contains adequate plans and

authority for dealing with air pollution emergencies [Section 110(a)(2)(F)];

8. Whether the SIP provides, "to the extent necessary and practicable" for periodic inspection and testing of motor vehicles in order to enforce compliance with applicable vehicle emission standards [Section 110(a)(2)(G)];

9. Whether the SIP provides for revisions, after public hearings, in order to take into account revisions of national primary or secondary standards "or the availability of improved or more expeditious methods of achieving" . . . [such standards] [Section 110(a)(2)(H)];

10. Whether the SIP provides for revisions, after public hearings, whenever the EPA Administrator determines "on the basis of information available to him" that the SIP is "substantially inadequate" to achieve the primary and secondary standards [Section 110(a)(2)(H)].

These specific determinations, required to be made by the EPA Administrator in reviewing proposed SIPs, reflect the minimum acceptable content of implementation plans which Congress intended to allow. As this Court recently stated: "Section 110(a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions." *Train v. NRDC*, 421 U.S. 60, 71, note 11 (1975). There is not a single word or phrase in Section 110(2)(2) which expressly or impliedly requires the EPA Administrator to consider the economic and technological feasibility of compliance in a SIP or portion thereof. On the contrary, the specific determinations which the EPA Administrator is required to make before approving a SIP make

it clear that Congress intended that state implementation plans be as strong as is necessary to achieve the national primary ambient air quality standards by the prescribed deadline. The thrust of Section 110(a)(2) is to limit the EPA Administrator's discretion to insuring that SIPs contain sufficient implementation mechanisms to enable achieving the primary ambient air quality standards within the prescribed time deadline.

The petitioner and its amici, however, point to the phrases "as expeditiously as practicable" and "reasonable time" in Section 110(2)(2)(A), and argue that these words inherently require consideration of economic and technological feasibility of compliance by the EPA Administrator in order for him to determine if those SIP content requirements are satisfied. The Third Circuit, in *St. Joe Minerals v. EPA*, 508 F.2d 743 (3rd Cir., 1975), *cert.* pending No. 74-1650, used the same analysis in holding that the Administrator was not prevented from considering the economic and technological feasibility of compliance in disapproving a portion of the Pennsylvania SIP on those grounds. *See also Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3rd Cir., 1972); *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3rd Cir., 1973) (Duquesne I); *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1193-1194 (3rd Cir., 1975) (Duquesne II).

Amicus curiae disagrees with petitioner's and the Third Circuit's analyses. If the phrases "as expeditiously as practicable" (in the context of achieving primary standards) and within "a reasonable time" (in the context of achieving secondary standards) are to have any significance, they must mean that the EPA Administrator is to review a SIP, in the context of those

phrases, to determine if that plan is *tough enough* to attain the standards. As to the phrase "reasonable time" within which a SIP proposes to meet secondary standards, EPA's review inquiry is to determine whether a *lesser*, not a greater, time period is required in the SIP before approval can be given. The phrase "as expeditiously as practicable," especially when viewed in the light of the legislative history of the 1970 Amendments, contemplates that SIPs be able to attain the primary ambient air quality standards *sooner* than the prescribed statutory deadline.

The Third Circuit in *St. Joe Minerals v. EPA*, *supra*, goes further and concludes that EPA is not prevented by Section 116 of the Clear Air Act,[14] from disapproving a SIP for economic and technological feasibility reasons and adopting a less stringent plan. Section 116, the Third Circuit argues, was intended only to permit a state, "under state law, to enforce stricter pollution controls than those that are included in the EPA approved implementation plan." *St. Joe Minerals Corp. v. EPA, supra*, 748. Thus, the Third Circuit believes that solely apart from the "applicable implementation plan," and solely under state law, a state may adopt and enforce a more stringent, technology-forcing emission standard or limitation under Section 116. The Third Circuit, however, has misconstrued Section 116. Section 116 was put in the Clean Air Act to protect those few states that may adopt stricter standards from attacks by affected industry, based on a preemption rationale. *Exxon v. New York City*, 372 F.Supp. 335 (S.D.N.Y. 1974). Furthermore, the Energy Supply and Environmental Coordina-

[14] 42 USC §1857d-1.

tion Act of 1974 directs EPA to review SIPs to determine if they contain emission standards more stringent than necessary to achieve timely attainment of the national ambient standards. Clean Air Act Section 110(a)(3)(B) (added in 1974). Clearly, Congress believed that any such more stringent requirements were contained *in* state implementation plans, not outside them.[15] Amicus curiae urges the Court to make this point clear in deciding this case.

Petitioner's argument that the words "practicable" and "reasonable" in Section 110(a)(2) require the EPA Administrator to consider economic and technological feasibility as a red herring. In Priority I areas (where SO^2 ambient standards are being violated), virtually all state implementation plans provide for attainment of the primary and secondary ambient sulfur dioxide air quality standards by July 1975—the maximum time allowed by the statutory terms of the Clean Air Act. Section 110(a)(2)(A); 40 C.F.R. section 52 *et seq.*[16] In some SIPs, the attainment dates for sulfur dioxide ambient air quality standards have been extended beyond the statutory deadline by the EPA Administrator pursuant to section 110(e). As a practical matter, sulfur dioxide emission sources have been given the maximum time allowed by Congress to achieve the primary and secondary ambient SO^2 standards. Even if the EPA

[15]It must also be noted that under the Third Circuit's analysis of Section 116 in *St. Joe Minerals Corp. v. EPA*, *supra*, the citizen suit provisions in Section 304 of the Clean Air Act could not be utilized to enforce stricter state-enacted technology-forcing emission limitations. This result is contrary to the intent of Congress in adopting Section 304. Sen. Rep. No. 1196, 91st Cong. 2d Sess. 36-39, 64-65 (1970).

[16]*E.g.*, Missouri's SIP attainment date for primary and secondary ambient SO^2 air quality standards is July 1975. 40 C.F.R. section 52.1332.

Administrator had statutory authority to consider economic and technological feasibility—which he does not have—in reviewing a proposed SO^2 emission limitation or compliance schedule, the EPA Administrator would still be required to approve a state implementation plan that allows SO^2 emission sources the *maximum time* permitted by Section 110(2)(2)(A) in which to attain ambient SO^2 standards. *Train v. NRDC*, 421 U.S. 60, 71 (1975).

Petitioners and their amici curiae also argue that, since the ability of a state implementation plan to assure timely attainment of the ambient air quality standards may turn on whether necessary fuels and technology for compliance are available or will be available within the specified time, the EPA Administrator must necessarily consider the economic and technological feasibility of the plan. This argument—particularly with respect to energy supplies—is answered by the Energy Supply and Environmental Coordination Act of 1974 (ESECA), Pub. L. No. 93-319. In this Act, Congress recognized that the shortage of clean energy supplies might affect attainment of the primary ambient standards, yet Congress refused to compromise timely attainment of these standards on grounds of economic and technological feasibility. In Section 110 (a)(3)(B), added by ESECA to the Clean Air Act in 1974, Congress gave the EPA Administrator authority to review SIPs to determine whether emission standards or limitations on fossil-fuel burning stationary sources could be relaxed without compromising the timely attainment and maintenance of the national ambient air quality standards. If the EPA Administrator determines that such relaxation is possible, he is

required to notify the affected state that it *may* submit a plan revision. Thus, the EPA Administrator cannot require such relaxation of emission limitations, but only suggest to the states that they be made. Congress is aware of the energy supply arguments raised by Petitioner—the alleged new grounds of economic and technological unfeasibility—but has refused to allow the national air quality standards to be compromised by these considerations.

The First, Fifth, Sixth, Seventh and Ninth Circuits all agree with the Eighth Circuit that, at the plan approval stage, the EPA Administrator is precluded from considering the economic and technological feasibility of such plans or their component emission standards and limitations.[17] This view, of course, does not mean that economic and technological feasibility may never be considered. Arguments I.D. and II, *infra,* address amicus curiae's view on when and to what extent economic and technological feasibility may be considered.

The Fifth Circuit has succinctly upheld the validity of technology-forcing emission limitations where the record showed that compliance was technologically infeasible at the time the limitation was adopted:

> "There is no basis whatever in the record for concluding that a compliance date of May 31, 1975, is technologically feasible. . . . However, we do not believe that this fact makes the regulation arbitrary or capricious. . ." *State of Texas v. EPA,* 499 F.2d 289, 317 (5th Cir. 1974).

[17] *NRDC v. EPA,* 478 F.2d 875, 885, 889 (1st Cir. 1973); *State of Texas v. EPA,* 499 F.2d 289, 317 (5th Cir. 1974); *Buckeye Power Inc. v. EPA* (Buckeye II) .... F.2d ...., 8 ERC 1317, 1320 (6th Cir. 1975); *Indiana & Mich. Electric Co. v. EPA,* 509 F.2d 839, 844-845 (7th Cir. 1975); *NRDC v. EPA,* 507 F.2d 905, 914 (9th Cir. 1974). *See also Society of the Plastics Industry v. OSHA,* 509 F.2d 1310 (2d Cir. 1975) *cert. den. sub nom. Firestone Plastics Co. v. U.S. Dept. of Labor,* 43 LW 3625 (May 27, 1975). In this case, the Second Circuit upheld the validity of OSHA's vinyl chloride exposure standard in the face of evidence that compliance was infeasible and might be for years to come.

The Ninth Circuit recently held in *Kennecott Copper Corp. v. Train,* .... F.2d .... (9th Cir. 1975) (Slip Opinion No. 75-1335 November 28, 1975) that Section 110(a)(2)(B), 42 USC section 1857c-5(a)(2)(B) provides statutory authority for EPA to promulgate regulations requiring a stationary source of pollution to engage in research to develop and apply continuous emission control technology that will enable timely attainment of the national ambient air standards. The Ninth Circuit held that the phrase in Section 110(a)(2)(B) ". . . and such other measures as may be necessary to insure attainment and maintenance. . ." requires the use of continuous emission reduction measures if necessary for timely attainment of the national standards. *Kennecott Copper Corp. v. Train, supra,* Slip Opinion 4-5. If feasible emission reduction technology is not available, then EPA (and, we would argue, the states) may require the source to undertake research and development of improved emission reduction technology that will enable timely attainment and maintenance of the standards. The Fifth and Sixth Circuits agree with this interpretation of Section 110(a)(2)(B). *NRDC v. Train,* 489 F.2d 390 (5th Cir. 1974), *reversed in part on other grounds sub nom. Train v. NRDC,* 421 U.S. 60 (1975); *State of Texas v. EPA,* 499 F.2d 289, 311 (5th Cir. 1974); *Big Rivers Electric Corp. v. EPA,* 523 F.2d 16, 21 (6th Cir.

1975). These case decisions are consistent with the view that economic and technological feasibility is not relevant at the plan approval stage.

B. Section 110(a)(2) Contains the "Relevant Factors" Governing the Scope of Judicial Review in Section 307(b)(1) Cases.

Since it is amicus curiae's position that the EPA Administrator may not disapprove a state implementation plan on grounds of economic and technological in feasibility, it follows that allegations of such infeasibility provide no basis for a petition for review of the Administrator's approval of a state implementation plan pursuant to Section 307(b)(1). Section 307(b)(1) provides only for judicial review to determine if the Administrator considered all the "relevant factors" in approving or disapproving a plan. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). The "relevant factors" confining the scope of the Court of Appeal's review, are those factors enumerated in Section 110(a)(2)(A)-(H), 42 USC section 1857c-5(a)(2)(A)-(H). Although the Court of Appeal is to make a searching and careful inquiry to determine if the Administrator considered the relevant factors, the scope of judicial review is limited to deciding whether the Administrator's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe, supra,* 416. Thus, unless the Clean Air Act's provisions specify that economic and technological feasibility are "relevant factors", petitions for review based solely on allegations of economic and technological infeasibility must be dismissed by the Court of Appeal. Furthermore, it makes no difference whether the alleged grounds of infeasibility arise before or after the 30-day review period set forth in Section 307(b)(1). In either case it is the Administrator's approval action that is being challenged and in either case the Administrator's action in approving or disapproving SIPs is to be guided solely by the "relevant factors" in Section 110(a)(2). Petitioner argues, however, that in enacting the 1970 Amendments Congress "could not and knew it could not know what the future might hold." Pet. Br. p. 14. But Congress certainly knew that it was asking industry to do what might have seemed impossible at that time. 116 Cong. Rec. 32901-02 (1970). This is precisely the nature of the technology-forcing objective which Congress adopted in the 1970 Amendments. To allow judicial review and invalidation of a state plan based on new (or old) grounds of economic and technological infeasibility would defeat the very purpose of technology-forcing.

With regard to alleged infeasibility grounds arising after the 30-day review period, Petitioners have also argued that the Court of Appeals, under Section 307(b)(1) has the jurisdiction and duty to engage in fact-finding, if necessary, by appointing a special Master to develop an evidentiary record. There is no legal basis for this argument. The Eighth Circuit, in the decision below, correctly declined to engage in such fact-finding. The DC Circuit, in *Oljato Chapter v. Train,* 515 F.2d 654 (DC Cir. 1975), correctly viewed the new "grounds" phrase in Section 307(b)(1) to mean at least that a petitioner seeking a revision of a new source performance standard must formally present the factual basis supporting the need for revising

the standard to the EPA Administrator before filing the petition in the District of Columbia Circuit. In this way, an evidentiary record can be developed at the agency level rather than directly by the Court of Appeal. Amicus curiae agrees with the analysis of *Oljato Chapter v. Train, supra,* and takes the position that, with respect to EPA-promulgated emission standards or plan requirements, any new grounds that allegedly justify a more relaxed standard must initially be presented to the EPA Administrator with a petition to revise the standard or requirement. With respect to state-originated emission standards contained in EPA-approved plans, amicus curiae takes the position that any new grounds, allegedly justifying a more relaxed standard, must be initially presented by the affected emission source to the appropriate state agency. *See* Section 110(a)(3)(B). That agency may then consider economic and technological infeasibility grounds, among others, in determining whether to revise the emission standard and re-allocate clean-up burdens among other sources. *See* Argument I D, *infra*. New grounds may also serve as the basis for seeking variance relief from compliance deadlines. During this process of asserting economic and technological infeasibility grounds at the state level, however, standards or requirements may not be revised in such a way as to preclude timely attainment of the national ambient air standards.

C. The Legislative History of the Clean Air Act Amendments of 1970 Demonstrates a Clear Congressional Intent to Preclude Considerations of Economic and Technological Feasibility From Interfering With the Timely Attainment of the National Ambient Air Quality Standards.

The Clean Air Act Amendments of 1970 were largely shaped by the Senate Bill [S. 4358, 91st Cong. 2d Sess. (1970)], particularly on the question of technology-forcing.[18] The Senate Report makes it clear that technical feasibility was no longer to interfere with timely attainment of air quality judged by Congress to be necessary for public health:

> "In the committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The committee determined that 1) the health of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with the application of available technology, would still be deleterious to public health.
>
> "Therefore the committee determined that existing sources of pollutants either should meet the standard of the law or be closed down."[19]

The House bill [H.R. 17255, 91st Cong., 2d Sess. (1970)] differed from the Senate bill by providing

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[18]*The Evolution of Technology Forcing,* 14-21, *supra,* note 3; *Union Electric v. EPA,* 515 F.2d 206, 215 note 30.

[19]Sen. Report No. 91-1196 91st Cong. 2d Sess. 2-3 (1970).

that the national air quality standards were to be achieved "within a reasonable time",[20] and by providing that "due consideration to the practicability and to the technological and economic feasibility of complying"[21] be given by the courts in enforcement proceedings. Other provisions in the House bill as well as remarks made during the floor debates indicate that the House committee believed economic and technological feasibility should be considered in setting emission standards and in achieving the national air quality goals.[22]

The differing House and Senate bills were sent to a conference committee and the outcome clearly favored the stronger, technology-forcing Senate version. As the Eighth Circuit pointed out in the opinion below:

> "The final form of the bill passed by both houses was worked out in conference. Although the conference agreement was technically a House bill, it is clear that the stronger Senate version prevailed in conference (footnote omitted)" *Union Electric v. EPA*, 515 F.2d 206, 215 (8th Cir. 1975).

Senator Eagleton's recollection, in the 1972 Clean Air Oversight Hearings, of the Conference Committee's deliberations underscores the Congressional intent of the final bill to eliminate all references to economic and technological feasibility except with respect to new source performance standards:

> "[T]he House had such language in the bill as: 'giving due consideration to economic and technological feasibility of compliance' that appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.
>
> ". . . .
>
> "That kind of language [economic and technological feasibility] appeared time and again in the House bill. We painstakingly deleted it everywhere it was to be found except on new source performance standards".[23]

Senator Eagleton's recollection of the Conference Committee deliberations is borne out by a comparison of the conference bill with the earlier Air Quality Act of 1967 and with the Senate and House bills.[24]

Clearly, the Eighth Circuit, in the opinion below, correctly gauged Congressional intent to preclude eco-

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[20]H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 26 (1970).

[21]H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 28 (1970).

[22]*Evolution of Technology Forcing*, 12-14, *supra*, note 3.

[23]Remarks of Senator Eagleton, *Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Session, part I (Title I) at 21 and 276 (1972).

The limited reference to feasibility in Section 111, as finally adopted, defines a standard of performance for new stationary sources as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Section 111(a)(1), 42 USC section 1857c-6(a)(1). The fact that Congress expressly provided for a qualified feasibility requirement in the adoption of Section 111 new source performance standards, but omitted any language concerning economic or technological feasibility in Section 110, further underscores that Congress deliberately intended that such factors were not to be considered during the plan approval stage.

[24]*The Evolution of Technology Forcing*, 20-21, *supra*, note 3.

nomic and technological factors from the Administrator's consideration of whether to approve an implementation plan.

D. During the Formulation or Revision of State Implementation Plans, Economic and Technological Feasibility May Be Considered in Allocating Clean-Up Burdens Among Emission Sources or Classes of Sources.

A major concern of the Petitioner appears to be that the Eighth Circuit's judgment below would preclude economic and technological feasibility from ever being considered. That is not the case. As a practical matter, the states have considered feasibility in preparing or revising their implementation plans in order to allocate clean-up burdens among emission sources in a way that best serves the public interest.

This Court has noted in *Train v. NRDC*, 421 U.S. 60, 64 (1975), that the Clean Air Act Amendments of 1970 explicitly preserved the principle that "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State". Section 107(a); 42 USC section c-2(a). Not only may States establish emission standards and limitations more stringent than necessary to attain and maintain federal ambient air standards (Section 116; 42 USC section 1857d-1), but they may also "adopt whatever mix of emission limitations [they] deem best suited to [their] particular situation". *Train v. NRDC, supra* 79. "The Act gives the agency [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are a part of a plan which satisfies the standards of section 110(a)(2) . . ." (*Id.* at 79) and ". . . so long as the ultimate

effect of a State's choice of emission limitations is compliance with the national standards for ambient air . . ." *Train v. NRDC, supra* 79. The Clean Air Act thus permits States to select emission limitations or standards for its implementation plan which may be economically or technologically infeasible at the time of their adoption, as well as to adopt emission standards based on considerations of feasibility.

The preservation of the State's right to adopt technology-forcing emission standards is an aspect of Congressional intent that the States, during preparation of their implementation plans, would make economic, social and technological *policy* decisions.[25] Such policy choices, based on public hearings, were intended to include judgments that certain emission sources required maximum pressure to develop effective technology for their control. Policy choices were also intended to include decisions, based on equity, economic or social considerations, that would permit maximum leeway for certain preferred sources to achieve compliance, so long as timely attainment of the ambient standards was achieved.[26] EPA's regulations for the preparation and submittal of State implementation plans recognize Congressional intent in giving the States flexibility to allocate attainment burdens on emission sources based on social and economic policy choices. 40 C.F.R. § 51.2(6) and (d).

During the preparation of a state implementation plan, a record of the public hearings and the legislative

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[25]These plans . . . involve public policy choices that citizens should make on the State and local level". Remarks of Senator Muskie in introducing the Conference version of the 1970 Amendments. 116 Cong. Rec. 20598 (1970).

[26]116 Cong. Rec. 16107 (1970). Remarks of Senator Cooper.

determinations of an enacting air pollution control agency might reflect considerations of economic and technological feasibility of compliance for classes of sources or single sources. It may then be tempting to assert that such a record should serve as the basis for the EPA Administrator, or for a Court of Appeal during judicial review, to reconsider such factors. But, as this Court has stated, "The Act gives the agency no authority to question the wisdom of a State's choice of emission limitations. . . ." *Train v. NRDC*, 421 U.S. 60, 79 (1975). For that reason, Amicus Curiae takes the position that a limited judicial review of the manner in which a State has apportioned clean-up burdens among sources or classes of sources is available only in State courts, and then only if timely petitions for judicial review are brought by affected sources. While the judicial review provisions of the Clean Air Act in section 307 do not expressly apply to State court review of an EPA approved plan, Amicus Curiae believes they should be construed to prohibit such review after the 30-day period has elapsed,[27] unless valid new grounds are raised. If an emission source fails to seek judicial review in the Court of Appeal within the 30-day period, but could later attack the validity of a State implementation plan in State court, the entire State effort to enforce and implement the plan to achieve timely attainment of the national standards would be compromised.

As stated in Argument I B above, the initially appropriate place for an affected emission source to raise new grounds of technological or economic infeasibility is before the state agency that adopts the emission

[27]Comment, 6 Rutgers-Camden Law Journal 810, 817 (1975).

standard. The state agency may then determine that it is appropriate to revise the emission standard so long as such revision does not preclude the timely attainment of the national ambient standards. *See* Section 110(a)(3)(B). Similarly, such new grounds of infeasibility may serve as a basis for granting an affected emission source an extension to its compliance deadline.

In summary, in the preparation of their implementation plans, states may consider but are not compelled to consider economic and technological feasibility of compliance with emission standards. Judicial review of such essentially legislative policy considerations may be held, if timely sought, only in State courts, limited by State laws governing judicial review.

II

Economic and Technological Feasibility May Be Relevant to Support Extensions and Postponements or in Fashioning Compliance Schedules and Enforcement Orders.

Petitioner has characterized the Eighth Circuit's decision below as holding that allegations of economic and technological infeasibility may never be raised. Petitioner's Brief, page 22. Thus, the petitioner has indirectly raised a due process claim. The Eighth Circuit's opinion did not so hold; it dealt only with section 307(b)(1) and whether economic and technological factors could be considered at the point in time when a Court is reviewing an EPA plan approval.

Congress expressly recognized the need to provide "safety valves" for compliance with technology-forcing standards when the right set of circumstances were present. Under section 110(e), 42 USC § 1857c-5(e),

provision is made for states to seek up to a two-year extension of the statutory deadline for attaining the primary ambient air standards. To approve any such extensions the EPA Administrator must find that one or more emission sources are unable to comply because necessary technology "or other alternatives" are not available or will not be available soon enough. Section 110(e)(1)A; 42 USC § 1857c-5(e)(1)(A). The Administrator must also find that the State has considered and applied "reasonably available alternative means of attaining such primary standard". Section 110(e)(1)(B); 42 USC § 1857c-5(e)(1)(B).

In addition, the Clean Air Act expressly provides a mechanism for postponing for one year any compliance deadlines for particular emission sources. Section 110(f); 42 USC § 1857c-5(f). In order to grant any such postponements, the Administrator must find among other things that "good faith efforts have been made to comply," that compliance is not possible due to unavailability of necessary technology, that the public health is being protected as much as possible, and that the national security requires continued operation of the source or class of sources. Section 110(f)(1)(A)-(D); 42 USC section 1857c-5(f)(1)(A)-(D).

Under section 110(a)(3), revisions to a State implementation plan, which reflect new allocations of economic and technological burdens on emission sources, may also be submitted by a State and be approved by EPA, so long as the overall timely attainment

of the national standards is not impaired. 42 USC section 1857c-5(a)(3).

Pursuant to the holding of this Court in *Train v. NRDC*, 421 U.S. 60 (1975), a source may also seek variance relief pursuant to a State implementation plan even if the accompanying compliance schedule permits the source to achieve the emission standard after the attainment date of the national ambient standards. *Train v. NRDC*, however, carefully limits such post-attainment date variances to be consistent with the State's overall ability to achieve timely compliance with the national standards. *Train v. NRDC, supra*, 79.

Similarly in section 113 enforcement proceedings, the EPA Administrator may consider economic and technological infeasibility in conjunction with the source's good faith efforts to comply, in fashioning appropriate enforcement orders extending the time allowed to achieve an emission standard or limitation. Section 113(a)(4); 42 USC section 1857c-8(a)(4). Amicus curiae takes the position, however, that economic and technological infeasibility cannot constitute an absolute defense to compliance. Any enforcement order fashioned after considering feasibility factors cannot alter the emission standard or limitation itself, but only extend the time deadline for compliance. Similarly, amicus curiae takes the position that defenses based on economic or technological infeasibility are relevant only as to the affected source's compliance,

and may not be raised to attack the validity of the implementation plan, control strategy, or emission standard itself.[28]

In sum, the due process concerns indirectly raised by petitioner have no merit. Adequate "safety valves" are present in the Clean Air Act to provide relief to affected emission sources which, notwithstanding their good faith efforts to comply, are faced with economic or technological impossibility of compliance.

Conclusion.

The Eighth Circuit's opinion below has correctly gauged the legislative history of the Clean Air Act's technology-forcing objective and correctly ruled that the EPA Administrator is precluded from considering economic and technological feasibility at the plan approval stage. Necessarily, a reviewing Court of Appeal is also without jurisdiction to consider such factors. Consideration of such factors at the plan approval stage would inevitably involve protracted delays in the promulgation of applicable implementation plans. Consideration of such factors would remove the incentive to force industry to develop necessary control technology that may not exist at the time a plan

[28] *See* Luneburg & Roselle, *Judicial Review Under The Clean Air Act Amendments of 1970,* 15 B.C. Ind. & Com. L.R.667, 675-76 (1974): "Invalidation at the enforcement level . . . . might leave insufficient time to re-promulgate, let alone expect compliance with, the controls. Moreover, without a provision foreclosing review of a plan's validity at the enforcement stage, there would be no assurance that some other enforcement court in the future would not invalidate the new plan and therefore start the process all over again."

is prepared. If Petitioner is correct, the integrity of Title I of the Clean Air Act Amendments of 1970 will be compromised and we will return to the pre-1970 era when the pace of development of pollution control technology was largely dictated by the pollution sources themselves. For these reasons, Amicus Curiae urges this Court to affirm the Eighth Circuit's judgment below.

Respectfully submitted,

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